No. 14349.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE R. CARR,

Appellant,

vs.

BEVERLY HILLS CORPORATION, a corporation, JOHN P. LORDAN, MAYNARD BRANDSMA, FRANCIS E. BROWNE, ROBERT W. LANGLEY, HARRY F. DIETRICH, and ROSS J. FERRAR,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Introduction.

It is conceded that the sole question presented by this appeal is whether or not the District Court erred in dismissing the complaint for lack of diversity of citizenship and, therefore, lack of jurisdiction over the subject matter. (Op. Br. 1, 14; Appellees' Br. 4.) Appellant files this reply brief for the purpose of pointing out that a substantial portion of appellees' brief does not deal with the issue of jurisdiction, which is the sole issue before this Court.

II.

Appellees' Argument Concerning a Demand Upon the Corporate Management Is Not Relevant to the Issues Presented by This Appeal.

A. The Rule Relating to a Demand Upon the Corporation's Management, in Secondary Actions by Shareholders, Does Not Deal With the Jurisdiction of the United States Courts.

In an effort to support their position that the District Court lacked jurisdiction over the subject matter, appellees argue strenuously that the appellant did not formally "demand" that the corporation take action to recoup its losses. That argument is not relevant to the issue presented by this appeal for it has long been established that the procedural rule which provides for such a "demand" (Rule 23(b), Federal Rules of Civil Procedure) does not deal with the question of the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised.

The purpose and nature of old Equity Rule 94, in which present Rule 23(b) finds its origins, was discussed at great length by the Supreme Court in *Venner v. Great Northern Railway Company* (1908), 209 U. S. 24, 33-35, 52 L. Ed. 666, 669-670, 28 S. Ct. 328, wherein it had been argued that the rule related to the *jurisdiction* of the United States courts. In disposing of that argument the Supreme Court said, *inter alia:*

> "But this argument overlooks the purpose and nature of the rule. The rule simply expresses the principles which this court, after a review of the

> authorities, had declared in *Hawes v. Oakland* * * * 104 U. S. 450, 26 L. ed. 827, to be applicable in the decision of a stockholder's suit of the kind now under consideration. *Neither the rule nor the decision from which it was derived deals with the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised.* * * * The jurisdiction * * * is prescribed by laws enacted by Congress in pursuance of the constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States." (Emphasis added.)

That decision has been followed consistently and is cited, quoted, and followed by the United States District Court for the Southern District of California, in a decision by the same District Judge who decided the within case in his decision in *Smith v. Sperling* (S. D. Cal., 1953), 117 Fed. Supp. 781, 802. Appellees have relied heavily upon that case.

The spirit of the above-quoted excerpt from the decision in *Venner v. Great Northern Railway Company* is reflected in Rule 82, Federal Rules of Civil Procedure, which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *."

B. The District Court Found That a Demand Upon the Corporate Management Would Have Been Futile.

Apart from the fact that Rule 23(b) does not deal with the jurisdiction of the United States courts, appellees have overlooked, or ignored, the fact that the appellant's verified complaint alleged, and the District Court found [Finding 8, R. 266], that it would have been futile for appellant to make any further demands for relief upon the corporation. [R. 9, 11-16, 266; Op. Br. 14.] The finding was not controverted by the appellee as, indeed, it could not have been.

The futility of a demand is readily apparent when one considers that the fraud and mismanagement charged in the complaint consisted in large part of stripping the corporation of its profit-making facilities and delivering them, piecemeal, to a co-partnership whose members owned 91% of the stock of the corporation [R. 61], and in which the individual defendants were all co-partners, and financially interested. [R. 5.]

Appellees' argument that appellant was required to make a new demand upon the Board of Directors after March 25, 1953, is also invalid. The acts of fraud and mismanagement complained of had taken place many months before, and the controversy between the appellant and the corporation had been going on for more than three (3) months. When the attorneys for the corporation and the individual defendants (they were all represented by the same attorneys at that time) [R. 12, 135, 142; Op. Br. 33; Appellees' Br. 19-20], learned that

appellant was about to file his action [R. 11, 133] they hurriedly advised the individual defendants to select some new directors for the apparent purpose of trying to force appellant to begin his efforts all over again. [R. 11-12, 133-137; Appellees' Br. 7.] If the complaint could have been filed a few weeks earlier appellees' argument would not have existed at all.

The argument has nothing to do with the merits of case and its facts do not change the facts of the controversy between appellant and the corporation. We have seen that the whole principle of "demand" has nothing to do with the jurisdiction of the federal courts. It is, therefore, submitted that appellees' argument has nothing to do with the issue before the Court on this appeal.

Respectfully submitted,

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